



**The Comptroller General
of the United States**

Washington, D.C. 20548

Spangenberg - B-2

Decision

Matter of: Vrooman Constructors, Inc.

File: B-226965.2

Date: June 17, 1987

DIGEST

Where workpapers contain clear and convincing evidence that the low bidder mistakenly omitted certain costs from its bid, the bid may be corrected upward to reflect such costs. Since the corrected bid would remain low, award properly may be made on the basis of the corrected bid.

DECISION

Vrooman Constructors, Inc., protests the General Services Administration's (GSA) decision to allow Alvarado Construction, Inc., to waive a mistake in its bid and to award a contract to Alvarado at its initial, uncorrected bid price pursuant to an invitation for bids for Project No. IC085190. The solicitation is for renovation of the Federal Building/Customs House in Denver, Colorado.

We deny the protest.

The invitation was issued on October 3, 1986, and solicited fixed-price bids for a base contract as well as two alternate, additive work items (for providing insulated exterior windows and an acoustical board ceiling system/lighting). The basic renovation work was grouped according to type of work into 16 separate divisions in the specifications, but the solicitation required only a total price for all base bid work. Four bids were received and opened on December 5. As funds were not available for either alternate, only the base bids were considered for award. Alvarado's bid of \$7,490,000 was the apparent low bid, and Vrooman's bid of \$7,850,000 was the apparent second-low bid.

On December 9, Alvarado notified the contracting officer that it had mistakenly omitted from its bid the price for Division 1 work ("General Requirement"). By letter of the same date, Alvarado offered an explanation of how it made this mistake, requested that it be allowed to amend its bid

039241

to include the price for Division 1 work, and furnished copies of the worksheets it used to prepare the bid.

The record shows that, after reviewing the worksheets, the contracting officer or other contracting activity personnel communicated with Alvarado on a number of occasions, requesting additional documentation to show what Alvarado intended to bid. As a result, Alvarado supplied the contracting officer with a two-page computer printout itemizing the various cost elements of its intended bid price for Division 1 work, three bid summary sheets used to calculate its total bid price, backup worksheets showing the bid price subtotals for work for Divisions 2 through 16, a number of worksheets showing subcontractor quotations, and several post-bid opening explanations of how the various worksheets were used to formulate the bid. Alvarado specifically stated that it wanted to correct its bid upward in the amount of \$314,180, which represented the omitted Division 1 costs. Alvarado also specifically indicated that it did not intend to withdraw the bid and, if necessary, would accept award at its original bid price.

Based upon her review of the information supplied by Alvarado, the contracting officer determined, on February 18, 1987, that there was clear and convincing evidence that Alvarado had made a mistake in its bid, but that the facts did not show what Alvarado had intended to bid. Accordingly, she decided to reject Alvarado's bid and, apparently, to award the contract to Vrooman. By letter of March 23, Alvarado protested to our Office on the basis that the rejection of its bid was improper, because the evidence presented was clear and convincing that Alvarado's intended bid would still have been the low bid. Alvarado also verified its bid as originally submitted and argued that it should be awarded the contract. In view of the protest, GSA reevaluated the materials, and notified our Office that it had decided to allow Alvarado to waive its claimed mistake and that the contract would be awarded to Alvarado at its original bid price. Accordingly, we dismissed Alvarado's protest as academic on April 30. By letter of June 2, Vrooman filed the present protest. GSA has advised our Office that it is holding award to Alvarado in abeyance pending resolution of Vrooman's protest.

Basically, Vrooman argues that GSA's decision to award to Alvarado is unreasonable and capricious, because it is impossible to determine from Alvarado's workpapers that Alvarado's intended bid would still have been lower than Vrooman's bid. Vrooman contends that when the claimed Division 1 error of \$314,180, plus profit and bond markup on those Division 1 costs, are added to Alvarado's original bid, Alvarado's corrected bid total will be lower than

Vrooman's bid by only about \$24,455, or 3/10ths of 1 percent. Vrooman argues the situation is even less clear because there are many business judgments that are incorporated into a bid (for example, markup and discounts) which are impossible to predict, especially in a competitive situation where the bids are so close.

GSA reports that, in response to the earlier Alvarado protest to our Office, it reexamined the contracting officer's decision to reject Alvarado's bid. Using the worksheets provided by Alvarado, GSA recalculated Alvarado's bid and ascertained that the corrected bid would be at least \$17,375 less than Vrooman's bid. Therefore, GSA (with the contracting officer's concurrence) determined that Alvarado's bid would have been low both as submitted and as corrected. GSA proposes to allow Alvarado to waive its mistake and to award Alvarado the contract at its initial bid price.

A bidder who seeks upward correction of its bid prior to award must submit clear and convincing evidence showing that a mistake was made, the manner in which the mistake occurred, and the intended price. The closer an intended bid is to the next low bid, the more difficult it is to establish that it is the bid actually intended and, for that reason, correction often is disallowed when a corrected bid would come too close to the next low bid. Since the authority to correct mistakes alleged after bid opening but prior to award is vested in the procuring agency, and because the weight to be given to the evidence in support of an asserted mistake is a question of fact, we will not disturb an agency's determination unless there is no reasonable basis for the decision. Schoutten Construction Co., B-215663, Sept. 18, 1984, 84-2 C.P.D. ¶ 318.

In limited circumstances, correction may be allowed even though the intended bid price cannot be determined exactly, provided there is clear and convincing evidence that the amount of the intended bid would fall within a narrow range of uncertainty and would remain low after correction. J.C.K. Contracting Co., Inc., B-224538, Jan. 9, 1987, 87-1 C.P.D. ¶ 43. Correction, however, is limited to increasing the contract price upward only to the bottom end of the range of uncertainty. Western Alaska Contractors, B-220067, Jan. 22, 1986, 86-1 C.P.D. ¶ 66; Vrooman Constructors, Inc., B-218610, Oct. 2, 1985, 85-2 C.P.D. ¶ 369.

The documentation supplied to the contracting agency by Alvarado in support of its claimed mistake does indeed provide clear and convincing evidence that Alvarado erroneously omitted its Division 1 costs from its original bid. The first worksheet is a computer printout that lists

the various cost elements of Division 1. On this printout, the Division 1 cost elements are broken down into categories entitled labor, materials, equipment, and subcontract; the printout provides unit and extended prices where appropriate and shows that the Division 1 costs totaled \$314,179 (which Alvarado apparently rounded to \$314,180).

The remainder of Alvarado's worksheets are handwritten. Alvarado explained in a letter to GSA on December 9, 1986, that it had started to enter its bid data into its computer but discovered that errors were appearing in the calculations. Alvarado stated that due to the short time left before bid opening, it could not correct the problem and therefore it manually summarized the bid. The handwritten worksheets correspond to the work required by the specifications for Divisions 2 through 16, and every single subtotal for Divisions 2 through 16 is entered on a bid summary sheet prepared by Alvarado. However, nowhere on the bid summary sheet is the subtotal for Division 1. The total of the Division 2 through 16 subtotals then was transferred to another bid summary sheet and certain additions (including bond costs, markups, sales tax, and insurance) and deductions (unexplained but entitled "Floor," "Elect.," and "Mech." and apparently related to various subcontracts) were made to it. This new adjusted total was then transferred to yet a third bid summary sheet and two more unexplained deductions were made to arrive at the total of \$7,490,000, which was entered in Alvarado's bid for the base contract.

Alvarado has given a reasonable explanation (i.e., the computer problem) of why only Division 1 costs were on a computer printout and how, in view of the computer problem and its haste to prepare its bid, it simply neglected to carry Division 1 costs over to the bid. In light of the fact that all handwritten entries for Division 2 through 16 were transferred to the bid summary sheets and then incorporated into the actual bid, we find that the workpapers present clear and convincing evidence that Alvarado intended to include at least the \$314,180 in Division 1 costs in its bid total. Western Alaska Contractors, B-220067, supra.

We note here that Vrooman argues the computer printout for Division 1 work is unreliable because computer-generated figures were stricken in several places and handwritten changes made. However, Alvarado has stated that these were the actual worksheets, the contracting agency has accepted this statement, and there is no evidence that anything but the original worksheets have been supplied. We have sanctioned the use of both handwritten and computer worksheets in bid correction cases while recognizing that

they are susceptible to tampering. Schoutten Construction Co., B-215663, supra. Further, we have explicitly considered worksheets even though they contained discrepancies or showed evidence of erasures. Id.; see also D. L. Draper Associates, B-213177, Dec. 9, 1983, 83-2 C.P.D. ¶ 662 at 3-4. Our examination in the present case shows that the crossed out items, which were corrected in handwritten form, were basically either obvious arithmetic errors or simply figures that erroneously were repeated. The workpapers were otherwise in good order and, in our view, were properly considered in support of the mistake claim.

Beginning with the \$314,180 Division 1 costs, GSA next calculated the maximum extra costs that would be incurred for additional bonding, sales tax, and insurance related to the Division 1 work. GSA was careful always to use a conservative estimate that would increase the calculation of the intended bid the most. For example, the computer printout for Division 1 showed a total of \$91,420 for materials and equipment. GSA added 7.1 percent of this amount to its estimate to account for all sales taxes (including state, district and city taxes). In fact, the record shows that most likely only 3.5 percent for city sales tax should have been added since Alvarado would probably have received an exemption for district and state tax because this is a federal project, and Alvarado alleges that it had used only 3.5 percent in calculating its bid. Furthermore, GSA and Alvarado both acknowledge that Alvarado owns most of the equipment and therefore would not have to pay any sales tax on a sizable portion of the materials/equipment component of Division 1 costs. Finally, GSA computed Alvarado's markup rate of 4.46 percent by dividing the \$320,000 markup for Divisions 2 through 16 by the total of \$7,181,600 in costs attributed to those Divisions. Using the same markup rate, GSA added \$14,012 for markup on the Division 1 costs (\$314,180 x 4.46 percent).

After adding the above-estimated costs and markup to the \$314,180 listed in the workpapers, GSA calculated that Alvarado's intended bid would have been at most \$7,832,625, or \$17,375 less than Vrooman's bid. Since the bid, both as submitted and as intended (as recalculated by GSA), was lower than Vrooman's bid, GSA proposes to award to Alvarado at its original bid price.

In our view, GSA's manner of calculating Alvarado's intended bid from the worksheets and its determination that Alvarado's intended bid would still remain low clearly were reasonable. While the recalculation does not show exactly what Alvarado's intended bid would have been, it does show a relatively narrow range within which the intended bid would have fallen. In other words, it is clear that Alvarado's

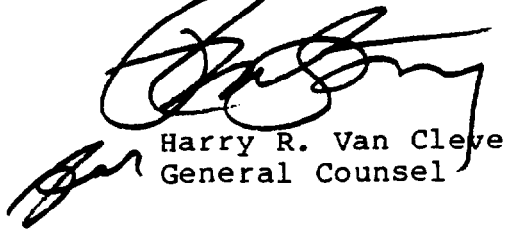
bid would have been at least \$314,180 higher if Division 1 costs had not been omitted, but the bid would have been increased by no more than \$342,624, and would still have been \$17,375 lower than Vrooman's bid. We conclude that since the Alvarado bid would be low in an event, the contract should be awarded to Alvarado.

Vrooman argues that where, as here, an intended bid would be so close to the next-low bid in price, the mistaken bid should be rejected because it is impossible to tell with certainty that the bidder would not have adjusted the higher bid price even more. Vrooman cites our prior decision in Advanced Images, Inc., B-209438.2, May 10, 1983, 83-1 C.P.D. ¶ 495, and others, as support for this position. However, we think Vrooman has misconstrued our previous decisions in this area. There is no particular percentage or gross dollar amount at which bids are too close to allow correction so long as clear and convincing evidence of the mistake is provided. Rather, the closer the intended bid comes to the next-low bid, the more difficult it is to establish the amount of the intended bid, and the closer we will scrutinize the workpapers and the mistake claim. See D. L. Draper Associates, B-213177, supra. As discussed above, close scrutiny reveals that Alvarado did in fact make a mistake and that its intended bid would have been the lowest. In the Advanced Images case cited by the protester, it simply could not be determined with certainty that the intended bid would have remained low.

While we conclude that GSA may properly award this contract to Alvarado, we do not agree with GSA that award should be made at the original, mistaken bid price. Where clear and convincing evidence shows that a mistake has been made in a bid, an agency may not properly award the contract at the original bid price so as to take advantage of the bidder's mistake and its low price. See 50 Comp. Gen. 655 (1971) and cases cited therein. As the evidence presented by Alvarado shows that its intended bid would have been at least \$314,180 more (the amount of the Division 1 costs) than the erroneous bid submitted, by separate letter to GSA we are recommending that Alvarado be allowed to correct its bid upward to include that amount. See Western Alaska Contractors, B-220067, supra. As the workpapers do not expressly indicate the exact amount of any additions or deductions

related to Division 1 costs that would also have been made,
no other corrections may be allowed. Id.

The protest is denied.



Harry R. Van Cleve
General Counsel